No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners.

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET. AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF FORMER PROFESSOR ROY A. KATRIEL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

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Former Professor Roy A. Katriel respectfully seeks leave to participate in oral argument under Rule 28.7, as *amicus curiae* in support of neither party, for 10 minutes (or such other time as the Court deems proper) in addition to the time allocated to the parties. Granting this motion would materially assist the Court by providing adversary presentation of a significant jurisdictional issue that the parties have not addressed and on which they are likely to agree. Both petitioners and respondents oppose the relief requested.

1. As described in *amicus'* brief, there is a significant question whether this Court has Article III jurisdiction to hear this case.[1] Petitioners rely only on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to assert that "[a]s class members who objected to the settlement, petitioners have standing to appeal the final judgment." Pet. Br. at 3 (citing *Devlin*). *Devlin*, however, does not support petitioners' appellate standing. Unlike this Rule 23(b)(3) case, *Devlin* involved an appeal of a mandatory class settlement certified and approved under Federal Rule of Civil Procedure 23(b)(1), and in which absent class members were not provided an opportunity to opt out of the proposed settlement. *Devlin* underscored the significance of this feature, noting that "in light of the fact that petitioner had no ability to opt out of the settlement, *see* Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds

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[1] In opposing *amicus'* request for leave to participate in oral argument, counsel for petitioners maintained that *amicus'* brief was misrepresented to be in support of neither party when, in fact, it supports respondents. This is not so. *Amicus* takes no position on the question presented in the petition-to what extent may *cy pres* class settlements be approved under Federal Rule of Civil Procedure 23. *Amicus'* sole interest is in the federal courts' appellate jurisdiction under Article III of the Constitution.

unacceptable and that a reviewing court might find legally inadequate." *Devlin*, 536 U.S. at 10–11. Here, however, the binding effect of the class settlement on petitioners results not from the mandatory terms of Rule 23(b)(1) (as in *Devlin*), but from petitioners' election to remain in a proposed settlement after reviewing its terms and being given a choice to remain in the settlement or avoid it. Petitioners' independent election to remain in the proposed settlement presented for approval to the district court cuts off the requisite causation element of Article III standing. Just last term, this Court held that appellate courts lack jurisdiction to review claims of individual putative class plaintiffs who voluntarily dismissed their case after their class certification motion was denied. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Justice Thomas' concurring opinion reasoned that when the *Baker* plaintiffs voluntarily dismissed their claims before the district court, "they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner." *Id.*, at 1717 (Thomas, J., concurring). The same reasoning applies to petitioners' attempt to appeal the judgment to which they consented by electing to remain in the Rule 23(b)(3) settlement class. Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing inquiry is the same. In each instance, the party who

consented to the entry of judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

2. This Court must address this threshold jurisdictional question of appellate standing under Article III before proceeding to the merits of the petition. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). When the Court addresses that threshold Article III question, it will likely find the parties in agreement. Petitioners invoked *Devlin* before both the Ninth Circuit and this Court to support their Article III standing to appeal the district court's approval of the class settlement. *See In re Google Referrer Header Privacy Litig.*, No. 15-15858, 2015 WL 5211307, at *1 (9th Cir. Sept. 4, 2015) (objector-appellants' opening Ninth Circuit brief); Pet. Br. at 3. Neither respondent challenged petitioners' reliance on *Devlin* or addressed the arguments raised in *amicus'* brief.[2]

3. This Court has never addressed whether *Devlin* extends to objectors who had an opportunity to opt out of a proposed class settlement but elected to remain in the settlement class. Federal courts of appeal that have addressed the elements of Article III standing have allowed for the possibility that *Devlin* may not apply to Rule 23(b)(3) or other non-mandatory settlement classes where an opportunity to opt out exists. *See, e.g., In re AAL High Yield Bond Fund, L.L.P. v. Deloitte & Touche,, L.L.P.,*

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[2] The Solicitor General raises a separate question whether, following *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016), plaintiffs satisfied the injury-in-fact requirement of Article III standing to maintain their action before the district court. *See* Brief for the United States as *Amicus Curiae* Supporting Neither Party, at 11-15. That question, which is addressed by respondents' briefs, deals with the separate issue of the plaintiffs' standing to maintain their action before the district court, as opposed to the question of the appellate standing of objectors who seek to appeal the approval of a Rule 23(b)(3) class settlement they elected to join.

361 F.3d 1305, 1310, n.7 (11th Cir. 2004) (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that] has led at least one court to believe that it applies only to mandatory class actions"); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin's* holding applies to opt-out class actions certified under Rule 23(b)(3)."). Other federal courts of appeal have expressed the opposite view, although their reasoning has been grounded mainly on whether objectors are to be accorded "party" status as opposed to analyzing whether objectors who voluntarily join a class settlement meet all the requirements of Article III standing. *See, e.g., Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (objector to a Rule 23(b)(3) class settlement had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"); *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"). Highlighting the disagreement among the federal courts of appeal, the Seventh Circuit has even summarily noted without analysis that any argument against extending *Devlin* to objectors seeking to appeal a Rule 23(b)(3) class settlement is "frivolous." *See Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014).

4. The Court has regularly appointed an *amicus* to argue in support of a significant jurisdictional position that neither party advances. *See, e.g., United States*

v. Windsor, 133 S. Ct. 2675, 2685 (2013); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 155-56 (2013); *NFIB v. Sebelius*, 567 U.S. 519, 543-46 (2012); *Kucana v. Holder*, 558 U.S. 233, 243-49 (2010); *Forney v. Apfel*, 524 U.S. 266, 268, 272 (1998); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 207-08, 210 n.9 (1968). More broadly, the Court has also granted leave to private *amici* to participate in oral argument when doing so promises to enhance this Court's consideration of the issues. *See, e.g.*, *Dalmazzi v. United States*, 138 S. Ct. 576 (2018); *Pacific Bell. Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 (2009); *Alabama v. Shelton*, 535 U.S. 654, 660-61 (2002); *Hohn v. United States*, 524 U.S. 236, 240-41 (1998).

Amicus understands that leave is rarely granted, as the Court can usually rely on the parties' presentation of the issues. Here, however, the parties agree on, and fail to present, a vital jurisdictional question, with implications for the correct interpretation of Article III in the recurring context of appeals of Rule 23(b)(3) class settlements. *Amicus* respectfully submits that, under these circumstances, the Court would benefit from adversarial oral argument.

Dated: September 3, 2018

Respectfully submitted,

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